IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.5089 OF 1990
WITH
SPECIAL CIVIL APPLICATION NO.3241 OF 1995
WITH
SPECIAL CIVIL APPLICATION NO.7000 & 7688 OF 1999
With CA No.7821/01 & CA 11962/01
WITH
SPECIAL CIVIL APPLICATION NO.7817 with CA 7116/02
& SCA 9942 OF 2002
WITH
SPECIAL CIVIL APPLICATION NO.994 OF 2003
WITH
SPECIAL CIVIL APPLICATION NOS.10881, 11210 of 2002
3147, 3152, 3159, 3162, 3164, 3166, 3167, 3168, 3169,
3170, 3171, 3172, 3173, 3174, 3175, 3176, 3177, 3178,
3179, 14058, 14060, 14061, 14062, 14370 & 14371 of 2003

HON'BLE MR.JUSTICE K.S.JHAVERI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

K S PATEL

Versus

SHRI SUCCESSOR IN OFFICE OF THE COLLECTOR

Appearance:
Mr. P.M. Raval, Mr. Bhaskar P. Tanna, Senior Counsel, with Ms Mahrook N. Kerrawala, Mr. D.C. Raval, Mr. D.A. Bambhania, Mr. I.S. Supehia and Mr. N.K. Majmudar for the petitioners.

Mr. Kamal B. Trivedi, Additional Advocate General with Ms Sangeeta K.Vishen for Respondent-State, & Mrs Ketty Mehta for respondents in SCA Nos.7000 & 7688/99.

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI
Date of decision: 16/09/2004

ORAL JUDGEMENT

1.0 In these petitions a common question of law is involved and therefore they are dealt with by this common judgement.

1.1 In SCA No.5089/90 the petitioner has prayed for a direction to restrain the respondents from reverting the petitioner before the juniors to the petitioner are reverted.

1.2 In SCA No.3241/95 the petitioners prayed for a direction to consider the case of the petitioner therein for promotion to the Class II post in the cadre of City Survey Superintendent on the basis of pre-29.8.1984 rules and to consider their case for promotion to the post of Shirestedar/Head Clerk from the date on which unqualified persons were promoted and further giving the benefit of deemed date of promotion, pay fixation, arrears of salary and further promotion, etc.

1.3 The petitioners in Special Civil Application Nos.7000/1999 and 7688/99 are the employees (hereinafter referred to as the second group of petitioners) who are affected by the issuance of the Circular dated 6th March 1995 by virtue of the fact that though they had cleared the departmental examination and they being eligible for the promotion to the higher post, in view of the fixation of the deemed date by Circular dated 6th March 1995, they were deprived of their right of promotion and other consequential benefits. Therefore, those petitioners have challenged the decision dated 6th March 1995 and also prayed to quash the promotion orders passed and seniority list prepared in pursuance of the aforesaid decision dated 6th March 1995..

1.4 In Special Civil Application Nos.7817 and 9942 of 2002 the prayer is to quash and set aside the order dated 17.6.2002 and 18.9.2002 respectively and for a declaration that the petitioners were given the deemed dates rightly and properly in the cadre of Shirestedars and Senior Clerks.

1.5 In Special Civil Application No.994/2003 and in Special Civil Application Nos. 10881, 11210 of 2002, 3147, 3152, 3159, 3162, 3164, 3166, 3167, 3168, 3169, 3170, 3171, 3172, 3173, 3174, 3175, 3176, 3177, 3178, 3179, 14058, 14060, 14061, 14062, 14370 & 14371 of 2003, the prayer is to quash and set aside the orders dated 8.7.2002 and 18.9.2002. By the decision dated 8th July 2002, passed by the Settlement Commissioner and Director of Land Reforms, Gujarat State, the benefits which were granted to the petitioners pursuant to the decision of the said authority dated 6th March 1995 were sought to be withdrawn. By the said decision the respondent authority has directed to reshuffle the deemed date given to the employees and to follow the guidelines issued on 13th August 1993. By order dated 18th September 2002 the deemed date given to the first group of petitioners in the cadre of senior clerk as well as Sheristedar has been cancelled and sought recovery of the payment made to them. Therefore, the aforesaid petitioners have challenged both the decisions dated 8th July 2002 and 18th September 2002.

2.0 The brief history of the events pertaining to the present petitions as they emerge from the record are as under:

2.1 One Shri H.M. Patel, working as Field Party Surveyor in the office of the Superintendent of Land Records, preferred Appeal No.84/81 before the Gujarat Civil Services Tribunal, Gandhinagar challenging the order of promotion to the post of Senior Clerk of a person who has not passed the qualifying departmental examination. The question raised in the said appeal was to the effect that whether the promotion can be given to the post of Senior Clerk without passing the qualifying examination. The Tribunal, by judgement and order dated 17th January 1983 allowed the said appeal. The operative part of the said judgement reads as under:

> "2. The appellant Shri Harish M.Patel who has passed the qualifying examination under Land Records Qualifying Examination Rules, 1970 is entitled to be promoted to the post of Senior

Clerk, which is a higher post and to which a person belonging to subordinate to land records service as defined in rule 2(k) of the Land Records Qualifying Examination Rule, 1970, is entitled to be promoted. As there are other such persons who are senior to the appellant, who have passed the qualifying examination and yet who are not promoted as Senior Clerk, the Settlement Commissioner is directed to give promotion to all qualified persons in light of the above observations and the case of the appellant Shri Harish M. Patel shall also be considered along with other qualified persons and they may be promoted to the post of Senior Clerk by Reverting, if necessary, the Senior persons who have already been promoted, but who have not passed the qualifying land records examination prescribed under the land records qualifying examination rules, 1970 and the appellant along with others be given deemed date of promotion when they ought to have been promoted under the rules. The said order shall be passed within three months from the receipts of the order. Though the appellant would not be entitled to any arrears, his pay on promotion must be fixed by notionally fixing the pay from the departments of promotion that may be presented to him."

2.2 Since the senior persons to said Shri H.M. Patel were not granted the aforesaid benefits, they approached the Gujarat Civil Services Tribunal, Gandhinagar, by way of filing Appeals No.234/84, 250/87, 335/87, and 109/87. The said appeals were allowed by common judgement and order dated 20th November 1992. The operative part of the said judgement reads as under:

"All the appeals are allowed and it is ordered that cases of all the appellants for promotions as Senior Clerk and further promotions be decided as per direction of this Tribunal in judgement dated 17.1.1983 in Appeal No.84 of 1981 in the case of H.M. Patel Versus Settlement Commissioner and Director of Land Records, Gujarat State, Ahmedabad and two others. Such promotions of the Appellants with deemed dates would be notional i.e. they would not be entitled to any arrears of pay etc. It is also directed that cases of all the employees in Land Records Department throughout the State of Gujarat of the time prior to notification dated 29th August 1984 should also be similarly decided

as per directions of this Tribunal in case of H.M. Patel. Promotions of such employees with deemed dates should also be notional i.e. they would not be entitled to any arrears of any Cases of employees for promotion subsequent to notification dated 29th August 1984 should be decided as per directions contained above in the body portion of this judgement."

2.3 Pursuant to the aforesaid order of the Gujarat Civil Services Tribunal, Gandhinagar, the State Government viz. the Settlement Commissioner by Circular dated 13th August 1993, issued certain guidelines whereby it was directed to give deemed date of promotion to the eligible employees pursuant to the judgement of the Tribunal.

2.4 In the meantime, since the directions of the Tribunal remained uncomplied with, some of the employees who had passed the examination had approached this Court by filing Special Civil Application No.12877 of 1993. This Court, while issuing notice in the matter on 10th November 1993, passed the following order:

"Notice returnable on December 02, 1993. By way of interim direction, it is ordered that the respondent shall consider the case of the petitioner in accordance with the judgement dated November 20, 1993 in Appeal No.234/87 decided by Gujarat Civil Service Tribunal, Gandhinagar (Annex `B' to the petition) and without following that, they shall do nothing in the matter stated herein up to 2/12/1993".

2.5 Thereafter the matter came to be admitted on 26th April 1994 and this Court observed as under:

"Rule returnable on 30.6.1994. In the meantime, the respondents are directed to comply with the direction of the Tribunal, in respect of 5 circles, Annexure `A' & `Body' and prepare the list pertaining to all circles strictly in conformity with those orders. It is directed that while doing so, the respondents shall essentially follow the said orders and also rules and more particularly also the date of passing of the qualifying examination and not adopting quota system between qualified and non qualified candidates. The list so prepared be placed before the Court on 30/6/1994".

2.6 Pursuant to the orders of this Court the Settlement Commissioner modified the directions issued vide Circular dated 13th August 1993 by Yadi (hereinafter referred to as the order) dated 6th March 1995 wherein it is stated that deemed date in the cadre of Senior Clerks would be given to all those who were qualified over those non-qualified Senior Clerks during the period between 1975 to 1984. In pursuance of the said order Special Civil Application No.12877/93 came to be withdrawn. The said order reads as under:

> "Mr. Anand tenders a letter dated 7th March 1995, written to him by all the petitioners, stating that they are no longer desirous of prosecuting the petition further. Mr. Dave is present for the respondents. Mr.Anand seeks leave to withdraw the petition, in view of that letter petition dismissed as withdrawn. Rule discharged. The interim order therefore stands vacated. The letter is kept on record, marked X"

2.7 According to the petitioners, subsequently a meeting was conducted on 25th August 1995 wherein the representatives of Government as well as employees were present and the guidelines issued on 6th March 1995 were the subject matter of discussion. The petitioners stated that on 7th September 1995 in the presence of the Settlement Commissioner and the Secretary of the Revenue Department the issue was discussed and authority was granted to the Settlement Commissioner to resolve the question of deemed date and the decision of the Settlement Commissioner was informally approved by the State Government.

2.8 Pursuant to the order dated 6.3.1995 the first group of petitioners were given deemed date of promotions. It is the case of the first group of petitioners that though the respondents were supposed to follow the directions contained in the order dated 6th March 1995, without any valid reasons and without following any procedure, the Settlement Commissioner reviewed the same and cancelled the instructions contained in paragraphs 2 and 4 of the Order dated 6th March 1995 by his order dated 8th July 2002 and further directed to reconsider the deemed date which was given to the employees and that the same may be reconsidered in pursuance of the guidelines issued on 13th August 1993. The reasons assigned by the respondent authorities to cancel the order dated 6th March 1995 are to the effect that the directions contained in the order dated 6th

March 1995 were not in consonance with the directions of the Gujarat Civil Services Tribunal dated 17.1.1983; that in Class III cadre, by virtue of passing the L.R.Q Examination, a junior in cadre gets undue advantage over his senior which is against the principles of natural justice; that L.R.Q. Rules only give a right of early promotion to such employee who has passed the examination earlier and it does not give any right to claim seniority; that by issuing deemed date orders many problems were created and that the order dated 13.8.1993 were more than sufficient and thus order dated 6th March 1995 is cancelled. While passing the above order dated 8th July 2002 the Settlement Commissioner has considered the judgement of the Tribunal as well as the instructions issued by the State Government on 24th May 2002.

2.9 In the year 1995, certain employees of the Land Records Department, who had not passed the L.R.Q. Examination have approached this Court by filing Special Civil Application No.2894/95 seeking a declaration that seniority of the employees is governed by the principle of continuous officiation. A further declaration has been sought for that it was not obligatory for the employees to pass L.R.Q. Examination as a condition precedent for further promotion to the post of senior clerk in Class III service. This Court, by order dated 18th June 1997 dismissed the said petition.

2.10 Pursuant to the order dated 8th July 2002, the first group of petitioners were issued show cause notice dated 1st August 2002 calling upon them to show cause as to why deemed date orders issued to them should not be cancelled. The said petitioners submitted detailed representation on 9th August 2002. Ultimately vide order dated 18th September 2002 the deemed date given to the first group of petitioners in the cadre of senior clerk as well as Sheristedar has been cancelled and the excess amount paid, if any, was sought to be recovered from the concerned employees.

2.11 It is under the aforesaid circumstances the first group of petitioners challenged the orders dated 8th July 2002 and 18th September 2002.

3.0 As stated earlier, the second group of petitioners are the employees who are allegedly affected by the issuance of Circular dated 6th March 1995 inasmuch as though they had cleared the departmental examination and they are eligible for promotion to the higher post, because of the wrong continuation of the deemed date, they are wrongly deprived of their right of promotion.

4.0 The contentions raised by Mr. B.P. Tanna, learned Senior Counsel on behalf of the first group of petitioners can be summarized as under:

(i) That as per LRQ Examination Rules coupled with the direction of the Tribunal in judgements dated 17.1.1983 and 20.11.1992, the cases of those persons who were working in the department at the time of notification dated 29.8.1984 and who have passed the examination, have to be considered over the case of such senior employees who have been promoted but who have not passed the LRQ Examination. It is upon these principles the petitioners have been given deemed date of promotions both in the cadre of senior clerks/maintenance surveyors and in the higher cadre of Sheristedar and the respondents now cannot revert the position.

(ii) That the Tribunal vide judgement dated 20.11.1992 has clearly directed that the department shall consider the case of all employees in Land Records Department throughout the State of Gujarat of the time prior to notification dated 29.8.1984 and the case of all such employees should be decided as per directions of the Gujarat Civil Service Tribunal in the case of Shri H.M. Patel. Therefore the petitioners are entitled to be promoted under the Rules.

(iii) That the order dated 6th March 1995 had been passed in pursuance of the interim orders issued by this Court dated 10th November 1993 and 26th April 1994 and therefore, the respondent authorities could not have cancelled the said order without obtaining prior permission of this Court.

(iv) That the Hon'ble Supreme Court and this Court has laid down the principle that seniority which has been settled for a long period of time cannot be allowed to be unsettled by any person who undoubtedly may have a rightful claim but who has approached the court at a delayed stage. By no stretch of imagination the State Government can reconsider the decision after a period of seven years, which has attained finality. In short, having allowed the order dated 6th March 1995 to continue for all these years, the respondent authorities are estopped from withdrawing the

same and withdrawing the deemed date orders passed on the said basis.

(v) That the deemed date has no concern with the existing posts and therefore the order issued by the State Government dated 6th March 1995 is just and proper.

(vi) Since the deemed date of promotion was given by virtue of the order dated 6th March 1995, the said order could not have been cancelled without giving the petitioners a chance of hearing.

(vii) That the show-cause notice dated 1st August 2002 has been drafted at a stage where the respondent authorities were pre-decided as regards cancelling the deemed date orders which is not in accordance with law.

5.0 Mr. N.K. Majumudar, who is appearing on behalf of some of the first group of petitioners submitted that he adopts the submissions advanced by Mr.B.P. Tanna, learned Senior Counsel. However, he further submitted that all the petitioners have passed Land Record Examination within prescribed chances and therefore as per Rule 4(1)(3) of Land Records Qualifying Examination Rules, 1970, they are entitled to retain their seniority. He also relied upon the order passed by the Tribunal and also contended that there is an unreasonable delay in passing the impugned order.

6.0 Mr. Supehia, who is appearing on behalf of some of the first group of petitioners submitted that he adopts the submissions of Mr. B.P. Tanna, learned Senior Counsel. He further submitted that since the petitioners have already retired, no recovery may be made and their pension may not be disturbed.

7.0 I may now advert to the contentions raised on behalf the second group of petitioners in Special Civil Application No.7000/1999. Mr. Bambhania, learned counsel raised the following contentions:

7.1 Mr.Bambhania submitted that the Government of Gujarat has sanctioned only 21 posts of Senior Clerks and at no point of time the cadre strength has been enlarged by the subordinate officers like Superintendent of Land Records, and or Settlement Commissioner and Director of Land Records. The power to increase the posts and cadre strength vests with the Government in Revenue Department, who can enlarge the cadre strength with the prior

permission of the Government in General Administration Department, and Government in Finance Department. It is the specific plea and case of the original petitioners that the Government has neither sanctioned the additional posts and/or permitted even for a temporary period to enlarge the cadre strength than sanctioned by the Government.

7.2 According to Mr. Bambhania, the total posts of Senior Clerk throughout the State can be manned by the employees promoted to the post of Senior Clerk from the feeder post of Junior Clerk and/or Surveyors.

7.3 He submitted that from the Desai Pay Commission onwards, the Senior Clerk cadre pay scale has been less than other cadre to which the Surveyor and Junior Clerk cadre is the feeder cadre.

7.4 He next contended that the directions of the Tribunal cannot be given a scope to extend promotion to all the employees of the State who had passed the Land Revenue Qualifying Examination shall be promoted irrespective of posts and accordingly more than 500 persons are extended such promotion as against less than 50 posts of senior clerks on extraneous consideration which is the subject matter of challenge before the Hon'ble Tribunal by examining the promotion rules, cadre strength, rules and Bombay Civil Services Rules, 1959 regulating the appointment by way of promotion.

7.5 According to Mr. Bambhania, the total strength cannot be enlarged by the divisional offices and/or by the Government in Revenue Department. Even in the present case, the Government in General Administration Department and Government in Finance Department has examined the issue and clarified that as against one unqualified one qualified to be substituted i.e. 1:1 by reverting one and replacing the one who ought to have been considered at the time vacancy was occupied by the unqualified person. According to the second group of petitioners the orders came to be passed ignoring all the rules and regulations and the law on the subject.

7.6 Mr. Bambhania submitted that any action and orders passed on the basis of asserted orders of this Court, which has factually incorrect foundation, cannot be given effect to as the officer who has passed the order had no authority to pass the instructions, which runs counter to the statutory rules and which has overriding effect over the instructions issued and orders passed.

7.7 Learned counsel submitted that by virtue of direction and observations, no employee can jump the promotion queue and procedure on the grounds of having passed the LRQ Examination. The post of Junior Clerk has the first promotion of Surveyor and thereafter Senior Clerk/Maintenance Surveyors, Sheristadars, etc. As per judgement of the Tribunal, if any person who has passed the LRQ Examination from inferior service is available as per statutory rules and seniority, the unqualified person must give room to him. The equation should be 1:1 which shall not exceed the cadre strength.

8.0 In substance, learned counsel has supported the impugned orders challenged by the first group of petitioners.

9.0 Affidavit in replies have been filed on behalf of the respondent authorities. The main defence urged by Mr. Kamal Trivedi, learned Additional Advocate General are as under:

9.1 Mr. Trivedi submitted that the instruction issued on 6th March 1995 is neither in consonance with the statutory rules nor the same is in consonance with the judgement of the Tribunal, and pursuant to the direction of the Tribunal in above referred appeal of Shri H.M. Patel, directions were already issued on 13th August 1993 which was in compliance with the order of the Tribunal.

9.2 According to Mr. Trivedi, the interim orders of this Court passed in SCA No.12877/95 were already complied with by issuing directions to the authorities by instructions dated 13th August 1993, but ignoring the same the order dated 6th March 1995 came to be issued which is bad in law.

9.3 Mr. Trivedi contended that the instructions issued on 6th March 1995 is in violation of basic principle of service jurisprudence inasmuch as deemed dates are given to the employees even though there were no sanctioned posts and the instructions issued by the Tribunal is to give deemed date only against such sanctioned posts. By giving such deemed date not only the Government is burdened with financial liability, but also the statutory provisions are violated and has ignored the judgements of this Court whereby persons who are qualified on the date of promotions were deprived of their rights because of this aforesaid decision and such eligible persons were made juniors, which is not the

object of the statutory rules. Therefore, considering the administrative exigency and burden on the State Government, the State Government has thought it fit to cancel paragraphs 2 to 4 of order dated 6th March 1995.

9.4 Mr.Trivedi submitted that as per the concept of "Deemed Date", it is only when any junior is promoted disregarding the senior, then in that case, deemed date of promotion is required to be given to the senior employee with effect from the date of promotion of the junior. In other words, the benefit of deemed date to be given to any senior/qualified employee has to be referable and related to the number of junior/non-qualified employees who might have been promoted in disregard of senior/qualified employees.

9.5 According to Mr. Trivedi, the instructions contained in letter dated 13.8.1993 were absolutely legal and proper and in consonance with the judgements dated 17.1.1983 and 20.11.1992 of the Tribunal, whereby what was directed was to grant "deemed date" to all the qualified employees,i.e. those who had passed LRQ Examination against those who were non-qualified employees and occupying the posts of promotion.

9.6 Mr. Trivedi submitted that it is admitted that the decision is taken first and post hearing is given, but principle of natural justice is complied with and out of 484 employees except few petitioners, majority of the employees have accepted the decision and seniority was reshuffled by the State Government. He therefore submitted that therefore in the interest of all concerned, this Court may not disturb the same, otherwise it will create administrative difficulties and huge financial burden on the State Government.

9.7 Mr. Trivedi further submitted that the order passed in SCA No.12877/93 wherein decision of 6th March 1995 is alleged to have been sought to be produced before this Court and relying on which the petition is withdrawn is not a judicial approval. The said order reads as under:

> "Mr. Anand tenders a letter dated 7th March 1995, written to him by all the petitioner, stating that they are no longer desirous of prosecuting the petition further. Mr. Dave is present for the respondents. Mr.Anand seeks leave to withdraw the petition , in view of that letter petition dismissed as withdrawn. Rule discharged. The interim order therefore stands

vacated. The letter is kept on record, marked X".

In view of the above it cannot be said that the State Government has bypassed the decision of the High Court.

9.8 Mr. Trivedi has fairly conceded that the payment which is already made cannot be recovered in view of the fact that the benefits which are wrongly granted cannot be recovered in view of the settled legal position. However, at least from 8th July 2002 i.e. the date on which the State Government has realized its mistake, the petitioners are not entitled for the benefits and from that date it will be open for the State Government to reconsider the deemed date given pursuant to the wrong decision dated 6th March 1995.

9.9 Mr.Trivedi has, in the alternative, submitted that if the Court is likely to set aside the order dated 8th July 2002 and the decision taken subsequently by the respondent no.3, then the State Government should be allowed to reconsider the decision dated 6th March 1995 inasmuch as the said decision is not in consonance with the statutory rules and should not be allowed to operate contrary to the judgement of this Court.

9.10 Mr. Trivedi has also submitted that while considering this alternative submission the Court may bear in mind that the decision may not be cancelled, but in the case of petitioners the State Government may be directed to reconsider the case keeping in mind the vacancies which were occupied by the non-qualified persons between 1975 and 1984; otherwise it will amount to opening Pandora's Box inasmuch as majority of the employees have accepted the decision of the State Government and the things which are settled will again be reshuffled by this order.

9.11 Mrs. Ketty Mehta appearing for the respondents in Special Civil Application Nos.7000 & 7688 of 1999 submitted that in view of the Circular dated 6th March 1995 the benefits which are granted to the respondents are just and proper and the prayers made in the said petition may not be granted inasmuch as their prayer has become ineffective and cannot be granted in view of the government decision.

10.0 In view of the aforesaid discussion, the points for adjudication in this petition are as under:

[a] Whether the instructions contained in the Circular dated 6th March 1995 are in consonance with the judgement of the Tribunal in the case of Shri H.M. Patel and Shri P.C. Shah?

[b] Whether there was a need for issuance of the Circular dated 6th March 1995 when there were already instructions by Circular dated 13th August 1993?

[c] Whether the order passed by the State Government dated 8th July 2002 is valid and whether the order of respondent no.3 cancelling the deemed date and disturbing the seniority of the petitioners and order of recovery is bad in law?

11.0 Before proceeding further it is relevant to note the relevant rules and Regulations.

11.1 Notification dated 29th August 1984 reads as under:

"No.GHM/84/197/M-EXM-1083/34289-H - In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Gujarat hereby makes the following rules further to amend the Land Records Qualifying Examination Rules, 1970, namely:-

1. These rules may be called the Land Records qualifying Examination [Amendment] Rules, 1984.

2. In the Land Records Qualifying Examination Rules, 1970 in rule 2, for clause [k],the following shall be substituted, namely:-

[k] Subordinate Land Records Service includes Clerks, Surveyors, Senior Clerks, Maintenance Surveyors, Nimtandars, District Surveyors and Head Surveyors."

The Rule 2(k) (prior to the amendment) of the Land Records Qualifying Examination Rules, 1970 (hereinafter referred to as the Rules of 1970) reads as under:

"2(k) Subordinate Land Records Service includes Clerks, Surveyors, Maintenance Surveyors, Nimtendars, District Surveyors and Head Surveyors."

The said rule 2(k) after 29.8.1984 amendment reads as

under:

"Subordinate Land Records Service includes Clerks, Surveyors, Senior Clerks, Maintenance Surveyors, Nimtendars, District Surveyors and Head Surveyors".

Rule 4 of the Rules of 1970 reads as under:

4 (1) Where any person belonging the lower division of the Subordinate Land Records Service fails to pass the examination within the prescribed number of chances [Section 3(1)] during the prescribed period shall lose his seniority until he passes the examination under Rule 5, he shall not be eligible for promotion to the higher post and confirmation therein.

(2) Where any direct recruit fails to pass the examination within the prescribed chances during the prescribed period, he shall be discharged from service.

(3) Where a person belonging to the lower division of the Subordinate Land Records Services passes the Land Records Qualifying Examination within the prescribed chances during the prescribed period, he shall retain his original seniority even if a person junior to him has passed the said examination and promoted to the higher post earlier than he.

Rule 5(1) of the Rules of 1970 reads as under:

"5(1) Where a person who has passed the Departmental Examination or who is exempted from passing the same is not available for promotion to the higher post a person whose chances to pass the examination are not exhausted under rule 3, may be promoted to officiate in the higher post subject to the condition that he shall be reverted on the availability of a person who has so passed the examination or on his failure to pass the examination within the prescribed chances during the prescribed period, whichever event occurs earlier."

Rule 6 of the Rules of 1970 prior to the amendment reads as under:

6. Where a person belonging to the Subordinate Land Records Service but not being a direct recruit has failed to pass the Land Record Qualifying Examinations within the prescribed chances and during the prescribed period, he shall notwithstanding such failure be eligible to appear at any time in such examination on payment of an examination fee of Rs.30/- and if he passes such examination, he shall be eligible for promotion to the higher post provided that they shall not be eligible to claim seniority over those persons who may have passed the examination earlier than he."

Rule 6 of the Rules of 1970 after 1980 amendment reads as under:

"6. Where a person belonging to the Subordinate Land Records Service but not being a direct recruit has not passed the Land Record Qualifying Examinations within the prescribed chances and during the prescribed period, shall also, if he so desires, be allowed to appear at such examination held subsequently on payment of examination fee, he shall be eligible for promotion to the higher post, but he shall not be entitled to claim seniority over those persons who have been promoted before he become eligible for the promotion on account of their having passed the Land Records Qualifying Examination earlier than him notwithstanding that he was senior to the persons so promoted in the cadre from which promotion was given."

11.2 Thus, as per rule 6, the person who has not passed the examination within the prescribed period and prescribed chances but has passed the examination later in point of time compared to his junior will retain the seniority in the same cadre. But in the event the junior who had passed the examination earlier in point of time and had been promoted to the higher post, then the person who has passed the examination later in point of time cannot claim seniority over his junior in the promoted post. This was the factual position earlier.

11.3 This Court in the case of K.N. Patel Vs. State of Gujarat and Anr, reported in 1990(2) GLR 1311 interpreted Rules 3, 4, 5 and 6 of Land Records Qualifying Examination Rules, 1970 and in para 16 it is held as under:

"16. Hence taking into consideration Rules 4 and 6 of LRQ Examination Rules it can be held that: (1) where any person belonging to the lower division of the subordinate Land Records Service fails to pass the examination within the prescribed number of chances and during the prescribed period, (a) he shall not be eligible for promotion to the higher post, (body) he shall not be confirmed on the said post and (c) he shall lose seniority for the purpose of being promoted to the higher post. Other things being equal he will get the chance subsequent to his junior who has passed the examination within the prescribed number of chances and during the prescribed period; (2) he can appear in the examination by paying the prescribed examination fee and if he passes such examination, he shall be eligible for promotion to the higher post but he shall not be entitled to claim seniority over these persons who have been promoted before he became eligible for promotion on account of their having passed the examination earlier than him notwithstanding that he was senior to the persons so promoted to the cadre from which promotion was given."

11.4 A Division Bench of this Court in Special Civil Application No.5232 of 1983, in its judgement dated 18.12.1983, pertaining to the same subject matter had given the following directions:

(I) It is necessary that in each of the districts, the District Collector concerned should prepare the seniority list on the following principles:

(1) Those clerks who have passed the qualifying examination i.e. R.Q.E. within specified specified period and specified chances are entitled to rearrangement of seniority inter se with the persons of their own class on the basis of seniority (Rule 9) those who are seniors to them but who passed subsequently and beyond specified period and specified chances cannot have any claim over those who fall under rule 9. Those who fall under Rule 9 become eligible for promotion when they acquire qualification by passing th examiantion, and that day should determine their eligiblity in the matter of promotion.

There is no question of re-adjustment as between persons of their class and persons who may be seniors to them but who passed the examinations sbusequently beyond the specified period and specified chances.

(2) Next comes the class of persons who have passed beyond specified period and specified chances. As between them, seniority will depend on the date of eligibility that in turn being the date of their acquiring the examiantion qualification. Therefore, first they have to be ranked on that basis and thereafter adjustment has to be made by providing for seniors in the clerical cadre who have passed the examination later over their juniors in the same class subject to the rule that they would not get that seniority as against those juniors who have not only passed but have actually been promoted. In other words, though as between persons who fall under Rule 7 seniority in the clerical cadre will be relevant for ranking for promotion to the post of Deputy Mamlatdar that will be subject to the condition that juniors who had been actually promoted before their seniors became eligible will not yield to seniors. Keeping in mind this rule the Deputy Mamlatdars belonging to the second class will have to be ranked for promotion and promotion effected earlier must be readjusted accordingly.

(3) Then comes the thrid class of persons, those who have not passed the examnation. Though they might have been promoted earlier and might have been continuing they would have no claim to be in the list and, therefore, they need not be ranked and that is the class of persons whose reversion could be effected even before preparation of a final list.

II. In the light of the aforesaid final directions, the petition will have to be allowed to the limited extent as mentioned in this judgement, with no order as to costs. The

concerned Collectors will have to arrange seniority in the cadre of Deputy Mamlatdars of the concerned petitioners and other eligible persons under their respective collectorates in the light of these directions and having arranged seniority of the concerned employees accordingly, proper orders of reversion will have to be passed by the concerned authorities.

III. The seniority of the concerned employees working as Deputy Mamlatdars and at those who are eligible to be promoted as Deputy Mamlatdars will have to be fixed by the concerned Collectors for their respective collectorates in the light of the present decision, within a period of three months from the receipt of writ by the respondent-Government. It is clarified that with reference to the Deputy Mamlatdars whose cases are covered by our final directions I(1) amd (2), the status quo as existing today will have to be maitnained till their inter se seniority is decided by the concerned Collectors in the light of this judgement. The court further directs that so far as Deputy Mamlatdars covered by third category envisaged by our directions I(3) are concerned, it would be open to the concerned Collectors to revert them in accordance with law, if at all, any need for reversion of any Deputy Mamlatdar arises."

12.0 It is also necessary to note the factual position prevalent before passing the impugned orders.

12.1 As per Rule 2(k) the Subordinate Land Records Service includes Clerks, Surveyors, Maintenance Surveyors, Nimtendars, District Surveyors and Head Surveyors. In the year 1973 recommendations of Desai Pay Commission were accepted by the Government and the benefit of revised pay scale was extended to the respective cadres of the Land Records Department. It appears that the pay scale of Senior Clerks was at a lower level compared to the other cadres of higher posts i.e. Pay scale of Senior Clerks was 330-550 whereas the other posts in the higher cadre were given the scales of 425-700, 425-800. In view of this, certain posts of Senior Clerks appeared to have been filled up by non-qualified candidates, i.e. the persons not having passed LRQ Examination.

12.2 In the case of Shri H.M. Patel in Appeal No.84/81 the Gujarat Civil Service Tribunal had directed

that all the persons who have passed the qualifying examination but yet not promoted as Senior Clerk, along with Shri H.M. Patel be considered and they may be promoted to the post of Senior Clerk by Reverting, if necessary, the Senior persons who have already been promoted, but who have not passed the qualifying Land Records Examination prescribed under the Land Record Qualifying Examination Rules, 1970. It was further directed that Shri H.M. Patel along with others be given deemed date of promotion when they ought to have been promoted under the rules. It is pertinent to note that the Tribunal has directed to give promotion to all qualified persons in light of the above observations made in the judgement. However, it appears that the Tribunal has not considered the fact that whether there were enough sanctioned posts to promote all the persons as directed by the Tribunal. Moreover, the appeal was filed by only one person and a general direction was issued in respect of all such similarly situated employees.

12.3 According to the respondents, as on 29.8.1984 there were, in all, 56 available posts of Senior Clerks out of which 5 were vacant whereas 18 posts were occupied by non-qualified persons.

12.4 In the year 1984 the Rules of 1970 were further amended by amending Rules 2(k) whereby the post Senior Clerks was included in the Subordinate Land Records Service. In the year 1987 four appeals were filed before the Tribunal contending that though the appellants were similarly situated as Shri H.M. Patel, they were not given benefits as were given to said Shri H.M. Patel. The said appeals were allowed and the respondents were directed to give promotion to the appellants therein. It was also directed that cases of all the employees in Land Records Department throughout the State of Gujarat of the time prior to notification dated 29.8.1984 should also be be similarly decided as per the directions of the Tribunal in case of H.M. Patel. It was also directed that promotions of such employees with deemed date should also be notional i.e. they would not be entitled to any arrears of pay. In pursuance of the aforesaid two judgements of the Tribunal i.e. dated 17.1.1983 and 20.11.1992, the Settlement Commissioner & Director of Land Records issued instructions/guidelines dated 13.8.1993. As per the said guidelines, the deemed date is to be given to the concerned persons who had passed the L.R.Q. Examination and qualified for the promotion to the post of Senior Clerk against the posts that have been occupied by the unqualified persons.

12.5 According to these guidelines, the promotion which have been given to the unqualified persons to the senior-most be withdrawn as and when qualified persons are available. The benefit of deemed date should be given from the date on which the unqualified persons have been promoted. The deemed dates are given to only those persons who have been promoted against the post of Senior Clerk from which the unqualified persons have been reverted.

12.6 Thereafter certain petitions were filed in this Court for implementation of the directions of the Tribunal.

12.7 Ultimately another Circular was issued on 6th March 1995 inter alia giving instructions in para 2 thereof that all eligible candidates who have passed LRQ Examination were directed to be given the deemed date. This would mean that deemed dates should be given to all the employees who had passed the qualified examination irrespective of the posts available at the relevant time. According to the respondents, as per the guidelines of 13.8.1993, the benefit of deemed dates was given to 92 Senior Clerks in all the divisions and 49 posts of Sheristadar. According to them as per the revised guidelines of 6th March 1995, the deemed dates are to be given to all the employees of all divisions and the number comes to 391 for Senior Clerks and in the cadre of Sheristadar it comes to 313.

12.8 According to the respondents, the Order dated 6th March 1995 created anomalies and imbalance in the subordinate cadre. Therefore, the Settlement Commissioner has taken the decision to quash and set aside those guidelines vide order dated 8th July 2002 which is challenged in the present petitions by the original petitioners.

13.1.0 In order to support the contentions of the petitioners, the learned counsel has relied upon the following decisions.

13.1.1 In the case of Malcom Lawrence Cecil D'souza v. Union of India & Ors., reported in (1976) 1 S.C.C. p.599, wherein in para 8 and 9, is held as under :-

> "8.The matter can also be looked at from another angle. The seniority of the petitioner quo respondents nos.4 to 26 was determined as long ago as 1956 in accordance with 1952 Rules. The said authority was reiterated in the seniority

list issued in 1958. The present writ petition was filed in 1971. The petitioner, in our opinion, cannot be allowed the challenge the seniority list after lapse of so many years. The fact that a seniority list was issued in 1971, in pursuance of the decision of this Court in Karmik's case (supra) would not clothe the petitioner with a fresh right to challenge the fixation of his seniority qua respondents nos. 4 to 26 as the seniority list of 1971 merely reflected the seniority of the petitioner qua those respondents as already determined in 1956. Satisfactory service conditions postulate that there should be no sense of uncertainty amongst public servants because of stale claims made after lapse of 14 to 15 years. It is essential that anyone who feels aggrieved with an administrative decision affecting one's seniority should act with due diligence and promptitude and not sleep over the matter. No satisfactory explanation has been furnished by the petitioner before us for the inordinate delay in approaching the Court. It is not doubt true that he made a representation against the seniority list issued in 1956 and 1958 but that representation was rejected in 1961. No cogent ground has been shown as to why the petitioner became quiescent and took no diligent steps to obtain redress.

9.Although security of service cannot be issued as a shield against administrative action of lapses of a public servant, by and large one of the essential requirements of contentment and efficiency in public services is a feeling of security. It is difficult no doubt to guarantee such security in all its varied aspects, it should atleast be possible to ensure that matters like one's position in the seniority list after having been settled for once should not be liable to be reopened after lapse of many years at the instance of a party who has during the intervening period chosen to keep quiet. Raking up old matters like seniority after a long time is likely to result in administrative complications and difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matters should be given a quietus after lapse of some time."

13.1.2 In the case of P. Mohan Reddy v. E.A.A.

Charles & Ors., reported in (2001) 4 S.C.C. p.433, it is held that directions given by the Court in relation to a rule of seniority after considering the same must be followed in preparing the seniority list unless a valid rule to the contrary with retrospective effect comes into existence.

13.1.3 In the case of Maharashtra Vikrikar Karamchari Sangathan Vs. State of Maharashtra, reported in (2002)2 SCC 552, the principle of res judicata is laid down. It is contended that in view of this decision, once the Court has taken a decision, the respondent cannot modify or alter it.

13.1.4 In the case of V.K. Dubey Vs. Union of India, reported in (1997) 5 S.C.C. p.81, wherein it is held as under :

"5. Shri Vijay Bahuguna, learned Senior Counsel appearing for the appellants, contends that since they had been working on the diesel side for a long number of years, merely because they were sent to training for three months to be absorbed in the electrical locomotive operations, their entire previous length of service cannot be wiped out causing detriment to their length of service and promotional avenues on account of the change in the policy. Therefore, the view taken by this Court requires reconsideration. We find no force in the contention. It is seen that the diesel engine derivers and the staff working with them operate in one sector, namely, diesel locomotive sector, while electrical engine drivers and the staff operating on the electrical engines operate on a different sector. Consequent upon the gradual displacement of diesel engines, instead of retrenching them from service they were sought to be absorbed by giving necessary training in the trains operation on electrical energy. As a consequence, they were shifted to a new cadre. Under these circumstances, they cannot have a lien on the posts on working in the electrical locomotives department. Under those circumstances, this Court has held that they cannot have a seniority over them. However, the Tribunal in the impugned

order has well protected the rights which had already accrued to them as under."

"We have been informed by the departmental representative that on such a redetermination of the seniority a large number of convertees who have already advanced several steps in the electrical side would face reversion resulting in not only hardship to such individual but also functional problem in running the locomotives. We, therefore, provide that on such redetermination of seniority, the persons who have already been promoted to higher grades in electrical side, shall not be reverted but their subsequent advancement to still higher grades shall be dependent on such redetermined seniority. However, no further contravention of the aforesaid principle of seniority"

"6. In view of the above direction, the accrued rights are protected and being enjoyed by the appellants. The Tribunal's order, therefore directed to safeguard the rights already had by the appellants. However, future promotions depend upon inter se seniority that may be determined by the authorities as directed by the Tribunal. Thus, we find no flaw in the order passed by the Tribunal warranting interference"

13.1.5 In the case of Haribans Misra & Ors., v. Railway Board & Ors., reported in (1989) 2 S.C.C. p.84, the question considered by the Supreme Court was regarding reversion and retrospective amendment of rules taking away vested rights without any reasonable justification. In that case the promotions granted and the entire length of service of about 9 years of the appellants were wiped out and the appellants were reverted to the posts initially held by them. In that case it was held that Rule 328(2) of the Manual is arbitrary and invalid and further held that retrospective amendment of rules taking away vested rights without any justification is arbitrary and open to judicial review.

13.1.6 In the case of K.V.S.R. Rao & Anr., v. Oil & Natural Gas Commission & Ors., reported in (2000) 10 S.C.C. p.562, the petitioner promotees alleged that

large scale direct recruitments were made exceeding the quota, while promotion of petitioners was not made to the next higher post following the quota, and that seniority in that post should be fixed accordingly. The petition was therefore quashing the seniority list. The supreme Court held that even if the reliefs are granted as prayed for after passing of two decades that would be unsettling the rights of the parties which are already settled and attained finality.

13.1.7 In the case of K.R. Mudgal & Ors., v. R.P. Singh & Ors., reported in (1986) 4 S.C.C. p.531, wherein it is held as under :-

"Satisfactory service conditions postulate that there should be no sense of uncertainty amongst the Government servants created by the writ petitions filed after several years. It is essential that anyone who feels aggrieved by the seniority assigned to him should approach the court as early as possible as otherwise in addition to the creation of sense of insecurity in the minds of the government servants there should also be administrative complications and difficulties. A government servant who is appointed to any post ordinarily should at least after a period of 3 to 4 years of his appointment be allowed to the duties attached to his post peacefully and without any sense of insecurity. In the present case, the appellants had been put to the necessity of defending their appointments as well as their seniority after nearly three decades. This kind of fruitless and harmful litigation should be discouraged. The High Court was wrong in rejecting the preliminary objection raised on behalf of the appellants (who were respondents in the writ petition before the High Court) on the ground of laches."

13.1.8 In the case of Institute of Chartered Accountants of India . L.K. Ratna & Ors., reported in (1986) 4 S.C.C. p.537, the Supreme Court held that the law declared by a court on interpretation of statute or statutory rules and mandamus/direction issued to implement or enforce the law so declared cannot be rendered ineffective by legislature. It is further held that Legislature cannot merely declare a judicial decision to be ineffective as that would amount to usurpation of judicial power by legislature.

13.1.9 In the case of K.N. Patel Vs. State of Gujarat

and Another, reported in 1990(2) GLR 1311 wherein it is held that a person (who is not a direct recruit to Class II post) would not lose his chance for being promoted to a higher post for failure to pass the L.R.Q. Examination within the prescribed chances and within the prescribed period, but such employee cannot merely on account of his seniority in the lower cadre claim seniority over his juniors who have earlier passed the examination within the prescribed chances and prescribed period and who have been promoted earlier to the higher post.

13.1.10 Learned counsel for the petitioners also relied upon a decision of this Court in the case of V.D. Gadhvi and Others Vs. State of Gujarat and others, passed in Special Civil Application No.2894/95, dated 18th June 1997 where the petitioners of that petition sought for a declaration that their seniority be governed by principle of continuous officiation and to declare that it is not obligatory for the said petitioners to pass Land Records Qualifying Examination as a condition precedent for further promotion to the post of Senior Clerk in Class-III services. This Court rejected the said petition.

13.1.11 By citing the aforesaid decisions learned counsel for the first group of petitioners submitted that their seniority may not be disturbed after a long lapse of time.

14.0 I may now deal with the contentions raised on behalf of the petitioners as under:

14.1 The first contention of the petitioners is that as per LRQ Examination Rules coupled with the direction of the Tribunal dated 17.1.1983 and 20.11.1992, the case of those persons who were working in the department at the time of notification dated 29.8.1984 and who have passed the examination has to be considered over the case of such senior employees who have been promoted but who have not passed the LRQ Examination. In this connection the relevant rule is Rule 6 of the Rules of 1970 which states that where a person belonging to the Subordinate Land Records Service but not being a direct recruit has not passed the Land Record Qualifying Examinations within the prescribed chances and during the prescribed period, shall also, if he so desires, be allowed to appear at such examination held subsequently on payment of examination fee of Rupees thirty and if he passes such examination, he shall be eligible for promotion to the higher post but he shall not be entitled to claim seniority over those persons who have been promoted

before he become eligible for the promotion on account of their having passed the Land Records Qualifying Examination earlier than him notwithstanding that he was senior to the persons so promoted in the cadre from which promotion was given.

14.1.1 Thus, the person who has not passed the examination within the prescribed period and prescribed chances but has passed the examination later in point of time compared to his junior will retain the seniority in the same cadre. But in the event the junior who had passed the examination earlier in point of time and had been promoted in the higher post, then the person who has passed the examination later in point of time cannot claim seniority over his junior in the promoted post.

14.1.2 The direction given by the Gujarat Civil Services Tribunal, Gandhinagar in Appeal No.84/81 in the case of Shri H.M. Patel is as under:

> "As there are other such persons who are senior to the appellant, who have passed the qualifying examination and yet who are not promoted as Senior Clerk, the settlement Commissioner is directed to give promotion to all qualified persons in light of the above observations and the case of the appellant Shri Harish M. Patel shall also be considered along with other qualified persons and they may be promoted to the post of Senior Clerk by Reverting if necessary, the senior persons who have already been promoted but who haven not passed the qualifying land records examination prescribed under the Land Records Examination prescribed under the Land Records Qualifying Examination Rules 1970, and the appellant along with others be given deemed date of promotion when they ought to have been promoted under the rules."

14.1.3 The aforesaid direction was issued by the Tribunal on the basis of its findings stated in para 4 of the judgement:

> "4. ... It is no doubt true that if the persons who have passed the qualifying examination are not available the persons who haven not passed the qualifying examination can be promoted but as soon as the qualified persons are available, unqualified persons promoted are required to be reverted and the qualified persons are required to be promoted. Rule 5 provided that where a

person who has passed the departmental available for promotion to the Higher Post, a person whose chances to pass the examination are not under the Rule 3 may be promoted to officiate in the Higher post subject to the conditions that he shall be reverted on the availability of a person who has so passed the examination or on his failure to pass the examination within the prescribed chances during the prescribed period, whichever event occur earlier. As the appellant has passed the qualifying examination under these rule in 1978 he is entitled to be promoted as Sr. Clerk by reverting his seniors, if necessary, who were promoted though they had not passed qualifying examination and therefore the appellant must succeed in his appeal."

5. As pointed out above there are other persons senior to the appellant who have passed the qualifying examination and yet they are not promoted as Senior Clerk and about 7 persons out of 12 are promoted as Senior Clerk though they have not passed the departmental examination. Therefore, it would not be proper for us to pass a direct order of promotion but the respondent no.1 the Settlement Commissioner and Director of Land Records must be directed that the appellant and other who have passed the qualifying examination should be promoted to the post of Senior Clerk on their passing the examination by reverting, if necessary, the persons who have not passed the qualifying examination though they are senior and they must be given deemed date when they ought to have been promoted as per the statutory rules and the same may be decided within three months from the date of records of this order."(emphasis supplied)

14.1.4 Thus, it is clear from the above finding that what is meant by the Tribunal was that those who have passed the qualifying examination should be promoted to the post of Senior Clerk on their passing the examination by reverting, if necessary, the persons who have not passed the qualifying examination and must be given deemed date. There cannot be any reading from the order to the effect that all the persons who have passed the qualifying examination should be accommodated on the post of Senior Clerk.

14.1.5 The order dated 20.11.1992 is based on the decision dated 17.1.1983 passed in four appeals filed

with similar prayer. Therein also, the direction was to the effect that the cases of all the employees in Land Records Department throughout the State of Gujarat of the time prior to notification dated 29th August 1984 should also be similarly decided as per directions of the Tribunal in the case of H.M. Patel.

14.1.6 Pursuant to the aforesaid two judgements viz. 17.1.1983 and 20.11.1992, the Settlement Commissioner & Director of Land Records issued instructions/guidelines dated 13.8.1993 for giving deemed promotion to only those candidates who had cleared LRQ examination during the period 1975 to 29.8.1984 against the posts that have been occupied by the unqualified persons. In my opinion, those instructions/ guidelines were in conformity with the judgements of the Tribunal.

14.1.7 However, the Settlement Commissioner on 6.3.1995 issued further instructions inter alia providing in para 2 thereof that all eligible candidates who have passed LRQ Examination were directed to be given the deemed date. This would mean that all the employees who have passed LRQ Examination should be given higher post irrespective of the fact whether such promotional posts are available or not. This was never the intention of the Tribunal. The contention before the Tribunal was that unqualified persons were promoted to the higher posts whereas qualified persons who have passed the requisite examination were not promoted. It is in this context the Tribunal directed that such qualified persons who have passed the LRQ examination should be promoted as against those non-qualified persons.

14.1.8 It is required to be noted that in a Department there may be more posts of Clerks than Senior Clerks inasmuch as the the post of Senior Clerk may be head of a Department. Further promotion from the post of Senior Clerk may be less in number than the posts of Senior Clerk. Promotional posts are always limited in number. The higher you go in hierarchy the lesser are the posts. Therefore, in my opinion, the proposition that all the employees who have passed LRQ Examination should be promoted cannot stand in the eye of law.

14.1.9 In view of the above I am clearly of the opinion that the respondent authority has rightly issued the guidelines/ instructions on 13.8.1993 in conformity with the judgements dated 17.1.1983 and 20.11.1992. Therefore it is clear that there was no necessity for issuance of further instructions on 6.3.1995.

14.1.10 According to Rule 6 of the Rules of 1970, the person who has not passed the examination within the prescribed period and prescribed chances but has passed the examination later in point of time compared to his junior will retain the seniority in the same cadre. But in the event of junior who had passed the examination earlier in point of time and had been promoted to the higher post, then the person who has passed the examination later in point of time cannot claim seniority over his junior in the promoted post. Therefore a combined reading of the rules and the judgements of the Tribunal, the only conclusion which can be arrived at is that the persons who had passed the LRQ Examination and qualified for the promotion to the post of Senior Clerk should be promoted against the posts that have been occupied by the unqualified persons. At the most it can be extended to the the higher posts which are available. A blanket direction to promote all the persons by giving enmasse deemed dates would create imbalance and complications.

14.1.11 It is of course true that as per the LRQ Examination Rules coupled with the direction of the Tribunal dated 17.1.1983 and 20.11.1992 the case of those persons who were working in the department at the time of Notification dated 29.8.1984 and who have passed examination were promoted. However, I am of the opinion that no interpretation can be made from the orders of the Tribunal to the effect that all the employees who have passed LRQ Examination should be promoted to the higher post. Therefore, the orders of the Tribunal would not help the petitioners to assail the order dated 6.3.1995.

14.2 The next contention of the petitioners is that the order dated 6th March 1995 had been passed in pursuance of the interim orders issued by this Court dated 10th November 1993 and 26th April 1994 and therefore the respondent authorities could not have cancelled the said order without obtaining prior permission of this Court. The direction given on 10th November 1993 is to the effect that the respondent shall consider the case of the petitioner in accordance with the judgement dated November 20, 1993 in Appeal No.234/87 decided by the Gujarat Civil Service Tribunal, Gandhinagar. Similarly in the order dated 26th April 1994 also the Court had issued directions to comply with the direction of the Tribunal in respect of 5 circles. Both the said orders are interim orders. The Court has not gone into the merits of the petition. The only direction was to strictly follow the order of the Tribunal. As found earlier, issuing Circular on

13.8.1993 was sufficient to comply with the order of the Tribunal. The guidelines issued on 6.3.1995 was not in accordance with the directions of the Tribunal. Therefore, in my opinion the respondents were justified in passing the order dated 8th July 2002.

14.3 The next contention of the petitioners is that the seniority which has been settled for a long period of time cannot be allowed to be unsettled and the State Government cannot reconsider the decision, which has attained finality, after a period of seven years. It is their further contention that the respondent authorities are estopped from withdrawing the benefits given to the employees. It may not be out of place to mention that seniority of these cadres are not finalized.

14.3.1 As stated above, the instructions contained in the order dated 6.3.1995 cannot be said to be in conformity with the directions issued by the Tribunal. In pursuance of the order dated 6.3.1995 large scale deemed dates were given to all the employees who had passed LRQ examination. This was done irrespective of the number of vacancies in the respective cadre. In view of the said decision even junior-most employees were given deemed dates as they passed the qualifying examination leaving out their seniors who did not pass the examination at the relevant times. This has created anomalies and imbalance in the subordinate cadre creating resentment and heart-burning amongst the government employees. Therefore, I do not find any illegality in reviewing and cancelling misinterpretation and/or mistake committed in issuing the instructions dated 6.3.1995.

14.3.2 To support the cancellation of instructions dated 6.3.1995 learned counsel for the respondents relied upon the following decisions:

14.3.3 In the case of The State of Punjab vs. Jagdip Singh reported in AIR 1964 SC Page 521, in para 6 the Supreme Court held as under:

> "The present case is not governed by either of these two rules, and the only rule which could possibly be invoked for supporting the action of the Financial Commissioner is R.7. Before, however, advantage could be taken of that rule, there had to be an actual or an anticipated substantive vacancy. Moreover, there is no rule which empowers the Financial Commissioner to create a post of Tehsildar. It is admitted before us that there was neither a substantive

vacancy nor an anticipated vacancy in the cadre of permanent Tahasildars on October 23, 1956. Indeed, this is clear from the fact that for providing for a lien for the seven Tahasildars who were confirmed by the Financial Commissioner on October 23, 1956, the Rajpramukh realised that new posts had to be created and therefore created seven supernumerary posts the very next day. Had there been any substantive vacancies, actual or anticipated, there would have been no occasion to create supernumerary posts. In the circumstances, therefore, only one conclusion must follow and that is that the order of the Financial Commissioner had no legal foundation, there being no vacancies in which the confirmations could take place. The order of the Financial Commissioner dated October 23, 1956 confirming the respondents as permanent Tahasildars must, therefore, be held to be wholly void." (emphasis supplied)

14.3.4 In this view of the matter grant of deemed date against non-existing posts by Settlement Commissioner is void and therefore the Government is justified in reviewing the situation and more particularly when some of the employees are adversely affected because of the decision dated 6th March 1995, which is issued contrary to the statutory rules.

14.3.5 In the case of S.L. Ahmed and Others vs. Union of India and Others reported in (1982) 2 SCC Page 458, the Supreme Court held that the revised pay actually paid to the petitioners therein initially was computed in error inasmuch as when fixing the pay in the revised scale the special pay was taken into account for the purpose of computing the accretion and therefore it became necessary to recompute the amount payable to the petitioners and to reduce it to the level paid to them. Therefore the Supreme Court has not interfered in the correctional step taken by the Government.

14.3.5 In the case of State of M.P. & Ors. vs. Mahesh Kumar & Ors. etc. reported in 1997 II CLR Page 8, the court has held that:

"Admittedly, this relaxation was only in relation to Jabalpur zone. In all other zones, no such relaxation had been given. Consequently, the question arises: whether the action taken by the DGP in granting relaxation to the Head Constables who appeared in the examinations held in Jabalpur

zone is correct? In view of the fact that no uniform rule applicable to all the Head Constables throughout the State has been issued, obviously, realising the mistake committed by him, the DGP had withdrawn the relaxation granted earlier on February 9, 1994 by proceedings dated December 2, 1994. It is true that if any vested right is created in favour of a person, the same cannot be deprived of or denied without affording to him an opportunity of hearing on the principle of violation of audi alteram partem. In this case, the Head Constables, who had written the examination, but failed to secure 50% or 40% in the general category and reserved category respectively, had no vested right for further grant of 15% and 10% grace marks respectively. The reason being that if the DGP grants for only one zone, they would scale a march over others who are similarly situated, namely, who failed in other zones in the examination, but were not given the same relaxation. In view of the above situation, the D.G.P. realising the mistake, has rightly withdrawn the relaxation and the 51 Head Constables belonging to general candidates and 15 Head Constables belonging to reserved category had no vested right in that behalf. The power to relax would include the power to withdraw on valid grounds. Therefore, the principle of natural justice was not violated."

14.3.6 In the case of Comptroller & Auditor General of India and Others vs. Farid Sattar reported in (2000) 4 SCC Page 13, the court held as under:

"5. It is no doubt true that unilateral transfer which is said to be coined by the appellants is not contemplated under the Fundamental Rules. What is contemplated is the transfer on written request under Fundamental Rule 15. But if such a transfer is not contemplated under the Fundamental Rule, it is not necessarily to be governed by the Fundamental Rule, but by the terms and conditions of such unilateral transfer. FR 22(I)(a)(2) applies where there is an ordinary transfer which is not by way of reversion to the lower post and in such a case, the pay of an employee on transfer to a new post has to be protected. Fundamental Rule 22(I)(a)(3) is applicable where an employee is transferred to a new post on his own request under Rule 15(a), and further in such a transfer

no reversion is involved. In such a transfer to a new post if the maximum pay in the time-scale of the transferred post is lower than his pay in respect of the old post held regularly, the transferee is required to draw that maximum as his initial pay. That is not the case here. In the present case, the respondent on his own volition sought transfer on certain terms and conditions accepted by him. The terms and conditions provided that the respondent on transfer would be appointed to a post which is lower to the pre-transfer post and he was also required to tender technical resignation from the pre-transfer post with a view to join the lower post as a direct recruit and was to rank junior to the juniormost employee in the cadre of Accountant. He was further required to forego any benefit of passing any departmental examination while working in the higher post. In such a situation, the pay of the respondent had to be fixed with reference to the lower pay scale and not with reference to the pay drawn by him in the higher post since he was to be considered as a direct recruit in the lower post."

14.3.7 In the case of Union of India and Others vs. Sujatha Vedachalam (Smt) and another reported in (2000) 9 SCC 187 on the transfer to a lower post, the employee's pay was erroneously fixed. Subsequently when the mistake came to light, the pay was fixed at correct stage and order for recovery of excess pay was passed. This was challenged before the Tribunal which allowed the application. However, the Supreme Court in the above case set aside the order of Tribunal by confirming the order passed by the authority.

14.3.8 In the case of Dilip M. Patel vs. State of Gujarat and Anr. reported in 2000 (2) G.L.H. 237, this court has held that:

"It is settled law that if the department by error granted some benefits in favour of someone and after realising the said mistake or error and immediately the said error or mistake has been corrected then in such circumstances, it is not necessary to give any reasonable opportunity or required to observe principles of natural justice. Because in that circumstances, it is the duty of the petitioner to point out on merits that the petitioner is entitled as a legal or vested right to the pay scale of Rs.650-1040 on

the basis of some statutory rules or resolution or some legal source. In the present case, the petitioner is not able to point out any such base for receiving a scale of Rs.650-1040."

14.3.9 Similar view has been taken by this Court in the decision dated 11.2.2004 passed in Special Civil Application No.2110 of 1999.

14.3.10 In the case of P.S. Prajapati vs. Oil & Natural Gas Corporation Ltd in Special Civil Application No.2110 of 1999, this court has held as under:

"When in accordance with the relevant Rules, the petitioner is entitled to receive only the train fare, he cannot be permitted to retain the excess amount, which was paid through mistake by the respondent. The sum and substance of this is that the respondent is entitled to recover the said amount from the petitioner and it was well within its bound when it has passed the impugned order dated 11th February, 1999."

14.3.11 In the case of R.R. Verma and others vs. The Union of India and others reported in AIR 1980 SC Page 1461, the court held as under:

"The principle that the power to review must be conferred by statute either specifically or by necessary implication is applicable to decisions purely of an administrative nature. To extend the principle to pure administrative decisions would indeed lead to untoward and startling results. Surely, any Government must be free to alter its policy or its decision in administrative matters. If they are to carry on their daily administration they cannot be hide-bound by the rules and restrictions of judicial procedure though of course they are bound to obey all statutory requirements and also observe the principles of natural justice where rights of parties may be affected. Here again, it can be emphasised that if administrative decisions are reviewed, the decisions taken after review are subject to judicial review on all grounds on which an administrative decision may be questioned in a Court."

14.3.12 In the case of S.I. Paras Kumar and Ors. Vs. S.I. Ram Charan and others, reported in JT 2004 (Suppl.1) SC 510, the Supreme Court held that the

promotion given on non-existing post contrary to rule is bad. In that case the High Court had quashed the promotion order which was upheld by the Supreme Court. In the present case the grant of deemed date is contrary to the judgement of the Tribunal as well as the statutory rules.

14.3.13 Thus, the sum and substance of the aforesaid decisions are to the effect that if there is a mistake in granting certain benefits, it is always open to the authority to cancel the same. Under Article 162 of the Constitution the State Government is empowered to issue administrative instructions from time to time, and the same may be varied and/or withdrawn, without there being any express or implied powers of review. It is always permissible in law to the authority to issue instructions and also to review such instructions. Therefore, in my view the decision dated 8.7.2002 cannot be said to be illegal or bad in law.

15.0 In view of the above discussion and findings the doctrine of "promissory estoppel" would not apply to the facts of the present case inasmuch as the alleged "promise" or a "declaration" is contrary to the judgement of the Tribunal and the statutory rules.

15.1 In the case of Dr. Ashok Kumar Maheshwari vs. State of U.P. & Anr. reported in 1998 (2) SLR Page 291, it was held as under:

"Applying the above principles to the instant case, even if it is accepted that the State Government or the Director, Medical Education & Training, assured the appellant or any of his colleagues that they would be promoted to the posts of Lecturer, such a 'promise' cannot be enforced against the respondents as the avenue of promotion for Demonstrators to the post of Lecturers was not provided either under the Statute or any executive instruction. Moreover, if the post of Lecturer was filled up by promotion of Demonstrator, it would defeat the existing mode of recruitment, namely, that it can be filled up by direct recruitment only and not by promotion. It may also be stated that the appellant did not make any clear, sound and positive averment as to which officer of the Government, when and in what manner gave the assurance to the appellant or any of his colleague that they would be promoted as Lecturers. It was also not stated that the

appellant had, at any time, acting upon the promise, altered his position, in any manner, specially to his detriment. Bald pleadings cannot be made the foundation for invoking the Doctrine of Promissory Estoppel."

15.2 Therefore, I do not find any substance in the contention raised on behalf of the petitioners to the effect that the authorities are estopped from withdrawing the benefits.

15.3 Learned counsel for the petitioners relied upon the decisions cited above to contend that seniority of the employees having once reached finality, should not be disturbed after a long lapse of time. In this connection learned counsel for the respondents relied upon the following decisions:

15.3.1 In the case of Malcom Lawrence Vs . Union of India, reported in (1975) 1 SCC 599 the Supreme Court observed as under:

"Although security of service cannot be used as a shield against administrative action for lapses of a public servant, by and large one of the essential requirements of contentment and efficiency in public service is a feeling of security. It is difficult no doubt to guarantee such a security in all of its varied aspects ..

15.3.2 In the case of D.D. Upadhyaya and others Vs. State of Gujarat, reported in 39(3) GLR 2264, wherein this Court took a view while dealing with the question relating to regularization of various Legal Assistants in service for last about 30 years and promoted to the post of Section Officer, that when the appointments and promotions were made dehors the Rules, the same can be quashed even after the expiry of 30 years and no equity comes in picture.

15.4 Another important aspect is that out of 484 employes except few petitioners, majority have accepted the decision.

15.5 Thus, if a benefit is extended wrongly, there cannot be any impediment in the way of the State to set it right when it is found out. In such cases the correctional process is required to be adopted and it cannot be said to be illegal or arbitrary.

16.0 The next contention of the original petitioners is that the deemed date has no concern with the existing posts and therefore the order issued by the State Government dated 6th March 1995 is just and proper. If there are existing posts, there cannot be any objection in granting promotion subject to the rules and regulations. In the present case, the instructions dated 6.3.1995 directed to promote all the employees who has passed the LRQ examination which was not the intention of the orders of the Tribunal. Therefore, extending the benefit to all the employees cannot be said to be in conformity with the order of the Tribunal.

16.1 The definition of deemed date is to the effect that "if any junior is promoted after superseding senior, then same deemed date has to be given to the senior as and when the senior is actually promoted". It is in this sense the Tribunal has passed the orders. However, the directions contained in the order dated 6.3.95 are contrary to the aforesaid proposition.

16.2 For the purpose of "deemed date" it is relevant to note a decision of the Supreme Court in the case of Ram Prakash Vs. S.A.F. Abbas, reported in AIR 1972 SC 2350. In the said decision the Supreme Court in paragraph 23 held as under:

> "23. A retrospective declaration that a post is equivalent to a senior post really amounts to declaration of an existing fact. It is that the person who has officiated continuously for a long time is allowed the benefit of a senior post prior to the appointment by promotion of such officer to the cadre of the Indian Administrative Service, Ordinarily, under Cadre Rules a non-cadre officer cannot hold a cadre post excepting for short time of three months and if it is for a longer period not without approval by the Central Government. Therefore, there is no occasion for declaration by the State Government of a non-cadre post as equivalent to a cadre post. The question of declaration arises only for the purpose of giving the promotee the benefit of the period of officiation prior to promotion. The use of the word "deemed" in Rule 3(8)(b) of the Regulation of Seniority Rules indicates that the Government has the power to make a retrospective declaration because it is only after promotion that there is any occasion to consider whether the period of officiation prior to promotion will be counted for purposes

of seniority." (emphasis supplied)

Thus, it is very clear that for "deemed date", it presupposes the existence of post and therefore the order dated 6th March 1995 giving deemed date from the date of passing of the departmental examination is contrary to service jurisprudence and not in consonance with the judgement of the Tribunal.

17.0 Learned counsel for the petitioners raised a contention that the impugned order could not have been cancelled without giving the petitioners a chance of hearing. In this context it is required to be noted that show-cause notices came to be issued to all the affected employees and therefore it cannot be said that there is violation of principles of natural justice. Even otherwise, as per the settled law, when such correctional measure is taken it is not compulsory to afford opportunity of hearing.

18.0 Learned counsel for the original petitioners relied upon a decision of the Supreme Court in the case of Sahib Ram Vs. State of Haryana and others, reported in 1995 Supp(1) SCC 18 wherein it is held that recovery of arrears in respect of upgraded pay scale given due to wrong construction of relevant order by the authority concerned without any misrepresentation by the employee cannot be made.

18.1 He next relied upon a decision in the case of Shyam Babu Verma and others Vs. Union of India and others, reported in (1994)2 SCC 521 wherein the Supreme Court held that since the petitioners received the higher scale due to no fault of theirs, it shall only be just and proper not to recover any excess amount already paid to them.

18.2 Another decision relied upon by the learned counsel for the original petitioners is in the case of ESP Rajaram Vs. Union of India, reported in AIR 2001 SC 581 wherein also in similar circumstances direction was given not to recover the amount already paid.

18.3 In the case of P.H. Reddy & Ors. Vs. N.T.R.D. and Ors. reported in 2002(2) SLR 694 the Supreme Court held that the employees-appellants who had been in receipt of a higher amount on account of erroneous fixation by the authority should be asked to repay the excess pay drawn. The said decision was followed by this Court in Special Civil Application No.6006/2002 decided on 28th January 2003.

18.4 This Court in Letters Patent Appeal No.578/2000 decided on 4.4.2001 held as under:

> "For the reasons aforesaid, we partly allow this appeal. The impugned order dated 25.1.2000 passed by the learned Single Judge is set aside in so far as direction for recovery of excess amount paid to the appellant is concerned. The action of the Respondent Board in giving the higher grade scale of Rs.1640-2900 is upheld, but the Board is restrained from making any recovery of excess payment made to the appellant on his earlier upgradation and fixation in the pay scale of Rs.2200-4000/-. Any recovery effected so far pursuant to the decision of the Board and on refixation of his pay in the pay scale of Rs.14\640-2900, be refunded or readjusted suitably in favour of the appellant within a period of 3 months from today."

18.5 In view of the aforesaid decisions Mr. Tanna, learned Senior counsel submitted that no recovery may be made even if the decision of the respondent authority is upheld.

18.6 Mr. Kamal Trivedi, learned Additional Advocate General, fairly submitted that the payment which is already made cannot be recovered in view of the fact that the benefits which are wrongly granted cannot be recovered in view of the aforesaid settled legal position. He, however, submitted that at least from 8th July 2002 i.e. the date on which the State Government has realized its mistake, the petitioners are not entitled for the benefits and from that date it will be open for the State Government to reconsider the deemed date given pursuant to the wrong decision dated 6th March 1995.

18.7 I have carefully considered the question of recovery of arrears. In my opinion, the mistake was committed by the respondent authority and therefore the original petitioners should not be penalised. Recovery of excess payment made to them for no fault on their part appears to be wholly unjustified. Such recovery would lead to unnecessary hardships to the employees. Therefore, looking to the peculiar facts and circumstances of the case, I do not think it proper to allow recovery of any excess amount already paid to them.

19.0 For the foregoing reasons I pass the following

orders:

19.1 In Special Civil Application No.5089/90 the prayer is for direction to restrain the respondents from reverting the petitioner before the juniors to the petitioners are reverted. Since the Circular dated 8th July 2002 is upheld, no directions are required to be issued in this petition and the petition stands disposed of accordingly. Rule is discharged with no order as to costs.

19.2 In Special Civil Application No.3241/95 the petitioners have prayed for a direction to consider the case of the petitioners therein for promotion to the Class II post in the cadre of City Survey Superintendent on the basis of pre-29.8.1984 rules and to consider their case for promotion to the post of Sheristedar/Head Clerk from the date on which unqualified persons were promoted and to give the benefit of deemed date of promotion, pay fixation, arrears of salary and further, promotion, etc. In this case it is directed that if the petitioners are eligible for promotion in pursuance of this decision, their case shall be considered and they shall be granted promotion accordingly. The petition is therefore partly allowed and rule is made absolute to the aforesaid extent with no order as to costs.

19.3 In Special Civil Application Nos.7000/99 and 7688/99 the prayer is to quash and set aside the order dated 6.3.1995 and 8.10.1997 and to set aside the promotion orders and seniority lists so far they were given deemed date to the respondents therein. However, since the Government has issued order dated 8.7.2002 which is being upheld in this judgement, the grievance raised in this petition would not survive. The respondents shall consider the case of the employees for promotion as per order dated 8.7.2002 and the Circular dated 17.8.1993. The aforesaid petitions are, therefore, partly allowed. Rule is made absolute accordingly with no order as to costs.

19.4 In Special Civil Applications No.7817 and 9942/2002 the prayer is to quash and set aside the orders dated 17.6.2002 and to direct the respondents to give promotion to the petitioners to class II posts. In these petitions the petitioners have already retired. In view of the aforesaid, the petitions are partly allowed qua recovery of arrears. The orders for recovery of arrears are quashed and set aside. It will be open for the State Government to refix their pension and the revised pension shall be paid with effect from September 2004. Rule is

made absolute to the aforesaid extent with no order as to costs.

19.5 The prayers in the special civil application nos.994/2003, 10881, 11210 of 2002 3147, 3152, 3159, 3162, 3164, 3166, 3167, 3168, 3169, 3170, 3171, 3172, 3173, 3174, 3175, 3176, 3177, 3178, 3179, 14058, 14060, 14061, 14062, 14370 & 14371 of 2003 are based on the premise that the promotions of the deemed date given on the basis of decision dated 6th March 1995 is valid and proper. However, for the reasons stated hereinabove, the said decision dated 6th March 1995 is not in consonance with the statutory rules and law declared by this Court in the case of K.N. Patel Vs. State (supra). Apart from that the deemed date can be given only against the existence of of a post. Therefore the Circular dated 13th August 1993 was just and proper and would have met with the directions issued by the Tribunal in the case of Mr. H.M. Patel and Mr. P.C. Shah. The respondents were, therefore, justified in issuing Circular dated 8.7.2002. Therefore, the prayers made in all these petitions, except with regard to recovery of arrears, cannot be granted. The petitions are therefore partly allowed only qua the question of arrears. Rule is made absolute to the aforesaid extent with no order as to costs.

19.6 The order passed by the Assistant Settlement Commissioner is quashed and set aside. The appropriate higher authority in the State Government will decide the deemed date of the petitioners keeping in mind the ratio laid down by this Court, the Tribunal and the statutory rules and also keeping in mind the guideliens issued by the Settlement Commissioner on 13th August 1993 and 8th July 2002 and fix the seniority of the petitioners accordingly. Such exercise shall be undertaken and completed within a period of six months from the date of receipt of writ of this order.

19.7 Looking to the peculiar facts and circumstances and in view of the aforesaid decisions discussed hereinabove, in all these petitions the notice for recovery of arrears are quashed and set aside and it is directed that in pursuance of the implementation order dated 8.7.2002, no recovery shall be effected from the concerned employees.

19.8 In view of the order passed in the main petitions Civil Application Nos.7821/01, 7116/02 and 11962/01 do not survive and are accordingly disposed of.

[K.S. JHAVERI, J.]

ar